1993

The State of Utah v. Donald Chad Nelson : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	930543 CA
Plaintiff/Appellee,	:	Case No. 930543-CA
v.	:	
DONALD CHAD NELSON,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

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APPEAL FROM A CONVICTION FOR BURGLARY, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-202 (1990), IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE TYRONE E. MEDLEY, PRESIDING.

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JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction for burglary, a second degree felony, in violation of Utah Code Ann. § 76-6-202 (1990).

This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1993).

STATEMENT OF ISSUE PRESENTED AND STANDARD OF REVIEW

Was the evidence sufficient for the jury to find that defendant committed the offense of burglary?

"When appellant challenges the sufficiency of the evidence supporting a jury verdict in a criminal trial, this [C]ourt 'must view the evidence in the light most favorable to the verdict and will interfere only when the evidence is so lacking and insubstantial that a reasonable person could not possibly have reached a verdict beyond a reasonable doubt.'" State v. Morgan, 228 Utah Adv. Rep. 18, 19 (Utah App. 1993) (quoting State v. Tanner, 675 P.2d 539, 550 (Utah 1983)). "Furthermore, defendant must 'marshal all evidence supporting the jury's verdict and must then show how this marshaled evidence is

insufficient to support the verdict even when viewed in the light most favorable to the verdict.'" State v. Scheel, 823 P.2d 470, 472 (Utah App. 1991) (quoting State v. Perdue, 813 P.2d 1201, 1207 (Utah App. 1991)).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Code Ann. § 76-6-202 (1990) provides:

> (1) A person is guilty of burglary if he enters or remains unlawfully in a building or any portion of a building with intent to commit a felony or theft or commit an assault on any person.
> (2) Burglary is a felony of the third degree unless it was committed in a dwelling, in which event it is a felony of the second degree.

STATEMENT OF THE CASE

The State charged defendant with burglary of a dwelling, a second degree felony, in violation of Utah Code Ann. § 76-6-202 (1990), and theft, a class A misdemeanor, in violation of Utah Code Ann. § 76-6-404 (R. 7).[1]

A jury convicted defendant burglary and acquitted defendant of theft (R. 92-3).

The trial court sentenced defendant to one to fifteen years in the Utah State Prison and imposed various fines and fees (R. 105).

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[1]The State originally charged defendant with a third degree felony theft (R. 7). However, the charge was amended to a class A misdemeanor after the value of the missing items was established (R. 7).

STATEMENT OF THE FACTS

At 1:15 a.m. on January 1, 1993, Denise Robinson left her apartment at 50 North "D" Street to attend a New Year's Eve party with a friend (R. 269). She locked the door when she left (R. 270). She returned to her apartment around 3:00 a.m., discovered her door unlocked and her apartment burglarized (R. 270). She called the police and reported her CD player, worth $110, stolen (R. 270). Her roommate, Angela Dennis, also reported her stereo, worth between $50 and $200, stolen (R. 281-82). Ms. Robinson discovered her bathroom window broken open, leaving enough room for someone to enter her apartment through the window (R. 271-72).

The next day, her neighbor Michael Nyer informed her that he had observed the break-in of her apartment (R. 244-45, 273). Ms. Robinson called the police a second time and the police questioned Mr. Nyer (R. 273-74, 287-88). Based upon his statements, the police arrested defendant, who lived in the apartment next to Mr. Nyer and across the hall from Ms. Robinson (R. 287-88). Mr. Nyer had known defendant for "perhaps four months or five" before the break-in (R. 244). He stated that he had "no question at all that it was [defendant]" he saw (R. 244).

Mr. Nyer stayed at home on New Year's Eve to avoid the crowds and drinking (R. 232). He went to bed at 1:00 a.m., but was awakened about a half hour to an hour later by a "crackling, crunching-type sound" similar to "breaking ice" (R. 232-33). The

third time he heard the sound, he got out of bed to investigate (R. 233).

From his bathroom window he saw defendant on the fire escape "doing something" with Ms. Robinson's bathroom window (R. 234-35). The fire escape landing at Ms. Robinson's back door is easily accessible through an emergency exit door located between Mr. Nyer's and Ms. Robinson's apartment. State's Exhibit 1. Mr. Nyer witnessed the defendant enter Ms. Robinson's back door (R. 235-36).

After returning to bed, Mr. Nyer heard Ms. Robinson's back door open and again heard the "crunching ice" noise (R. 236). Mr. Nyer got out of bed a second time and again witnessed defendant doing something with Ms. Robinson's bathroom window (R. 236).

Mr. Nyer then went to his front door and looked out the peephole (R. 236). While looking out his peephole, he witnessed defendant exiting Ms. Robinson's front door onto the inside landing (R. 236-37). The inside landing was well-lit with two one hundred watt lightbulbs (R. 238), State's Exhibit 1.

Mr. Nyer returned to his bed a third time, but continued to hear activity on the fire escape landing and in the hall (R. 238-39). When he heard Ms. Robinson's back door open a third time, he looked out his bathroom window and observed the venetian blinds in the victim's bathroom open revealing defendant inside the bathroom (R. 239). He had a clear view of the

defendant when Ms. Robinson's venetian blinds opened because the light was on in the bathroom (R. 239).

Mr. Nyer also observed that the bottom half of the bathroom window did not have any glass remaining in it (R. 240). Initially, Mr. Nyer thought that the window had merely been opened, but then observed that perhaps the window "had been broken out" as it was a "two-sash sliding window that had been painted shut over the years" (R. 240).

Mr. Nyer returned to his front door's peephole and observed the defendant leaving Ms. Robinson's apartment by the front door for the second time (R. 240-41). Although suspicious, Mr. Nyer did not immediately report the incident because he knew Ms. Robinson was in the process of moving, and thought perhaps defendant was helping her (R. 243). Mr. Nyer never saw defendant carrying anything from the apartment (R. 241, 255-56).

Mr. Nyer observed defendant wearing "brand new, fancy, high-tech, heavy duty" tennis shoes at the time he saw defendant exiting Ms. Robinson's apartment (R. 252-53). Defendant admitted that he had received a pair of similar shoes for Christmas, but claimed that the shoes had been stolen from his place of employment on December 26th (R. 306-07). Mr. Nyer also observed that defendant was wearing "gray sweat pants" (R. 252). Defendant's alibi witness testified that defendant was wearing "[a] faded pair of white-washed blue pants" (R. 299). Defendant similarly claimed that the night of the burglary he wore "a pair of stone-white pants" (R. 307).

When Mr. Nyer discovered that Ms. Robinson's apartment had been broken into, he informed her that he had seen defendant in her apartment (R. 244-45). After Ms. Robinson called the police, Mr. Nyer explained to them what he had seen the previous night (R. 245).

Defendant's entire defense rested upon his testimony and the testimony of his live-in girlfriend, Saundra Renee Willson. Willson testified that she and defendant played cards with friends in her apartment until 11:30 or 11:45 p.m. on the evening of the burglary (R. 295). She claimed that after the friends left at 11:45 p.m., both she and the defendant remained in their apartment until she went to bed at 2:35 p.m. (R. 296-97). The defendant also claimed that he never left his apartment between midnight and 3:00 a.m. on the night of the burglary (R. 306-06, 308).

SUMMARY OF THE ARGUMENT

Defendant fails to satisfy the marshalling requirement by ignoring the evidence that supports the jury's guilty verdict. He merely reargues the evidence he presented which the jury rejected. Accordingly, this Court should refuse to address defendant's claim on appeal. However, should this Court determine to reach the merits of defendant's challenge, there was ample evidence to support the jury's finding of guilt.

INTRODUCTION TO ARGUMENT

Defendant labels his argument "The Court Erred When it Prevented the Jury From Considering the Charge of Criminal

Trespass Instead of Burglary." Br. of App. at 7. While defendant did "request the Court to amend Count 1 of the Information to charge criminal trespass" (R. 317), he did not request a jury instruction on criminal trespass, nor is there any record evidence that the trial court considered or ruled on this issue. He has, therefore, waived its consideration on appeal. See Broberg v. Hess, 782 P.2d 198, 201 (Utah App. 1989) ("When there is no indication in the record on appeal that the trial court reached or ruled on an issue, this court will not undertake to consider the issue on appeal").

Moreover, defendant has not provided this Court with any legal analysis in support of the assertion that the jury should have considered this issue. This Court could likewise refuse to address this issue on that ground. See State v. Amicone, 689 P.2d 1341, 1344 (Utah 1984) ("Since the defendant fails to support this argument by any legal analysis or authority, we decline to rule on it."); accord State v. Larsen, 828 P.2d 487, 491 (Utah App. 1992) ("A reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research.") (quoting State v. Bishop, 753 P.2d 439, 450 (Utah 1988)), aff'd, State v. Larsen, 228 Utah Adv. Rep. 3 (Utah 1993).

Given defendant's failure to either preserve or adequately brief this issue, the State will address what appears to be defendant's contention on appeal; that there was

insufficient evidence to convict him of burglary. See Br. of App. at 7 ("Even when the marshalled facts and inconsistencies are viewed in a favorable light, the prosecution's case-in-chief still failed to [sic] the intent required for burglary").

ARGUMENT

DEFENDANT FAILS TO SATISFY THE MARSHALLING REQUIREMENT. HOWEVER, SHOULD THIS COURT DETERMINE TO REACH THE MERITS, THE STATE PRESENTED SUFFICIENT EVIDENCE FOR THE JURY TO FIND DEFENDANT GUILTY OF BURGLARY.

Defendant asserts the evidence was insufficient for the jury to find that he committed the offense of burglary. Br. of App. at 7. However, he challenges that verdict by merely reciting the evidence that supports his theory of the case. See Br. of App. at 3-6, 7-8. He has, therefore, failed to satisfy the marshalling requirement and this Court should refuse to address his claim of error.

A. Standard of Review

"When appellant challenges the sufficiency of the evidence supporting a jury verdict in a criminal trial, this [C]ourt 'must view the evidence in the light most favorable to the verdict and will interfere only when the evidence is so lacking and insubstantial that a reasonable person could not possibly have reached a verdict beyond a reasonable doubt.'" State v. Morgan, 228 Utah Adv. Rep. 18, 19 (Utah App. 1993) (quoting State v. Tanner, 675 P.2d 539, 550 (Utah 1983)). Additionally, in order to successfully challenge the sufficiency of the evidence, "defendant must 'marshal all evidence supporting

the jury's verdict and must then show how this marshaled evidence is insufficient to support the verdict even when viewed in the light most favorable to the verdict.'" State v. Scheel, 823 P.2d 470, 472 (Utah App. 1991) (quoting State v. Perdue, 813 P.2d 1201, 1207 (Utah App. 1991)); see also State v. Chavez, 840 P.2d 846, 848 (Utah App. 1992), cert. denied, 857 P.2d 948 (Utah 1993).

B. Defendant Has Not Properly Marshalled the Evidence

Defendant concedes that the jury correctly determined that he entered Ms. Robinson's apartment unlawfully. Br. of App. at 7, 11, 12. Despite this concession, he asserts that the evidence is insufficient to support the jury finding that he made that unlawful entry with the intent to commit a felony. Br. of App. 7-11.

In support of his insufficiency argument, defendant merely reargues the evidence he presented in support of his alibi theory. He then compares it to the State's evidence and attempts to demonstrate that his evidence is more credible. His entire argument is that the jury "disregarded his alibi" and that the evidence he presented was "ignored." Br. of App. at 7-8.

Obviously, as in every criminal jury trial where the defendant relies on an alibi theory and is convicted, the jury chose to believe the evidence presented by the State and not that argued by the defendant. As the supreme court stated in State v. Valdez, 748 P.2d 1050, 1053 (Utah 1987), "[t]he mere existence of the contrary evidence does not warrant disturbing the jury's

verdict. . . . The jury apparently found the evidence presented by the State credible." Accord State v. Lamm, 606 P.2d 229, 231 (Utah 1980) ("It is the exclusive function of the jury to weigh the evidence and to determine the credibility of the witnesses . . ..").

Defendant's failure to demonstrate the State's evidence, when properly marshalled, is insufficient to support the jury's verdict is fatal to his sufficiency claim and this Court should refuse to consider the merits of defendant's claim on that ground. State v. Lemons, 844 P.2d 378, 381 (Utah App. 1992), cert. denied, 857 P.2d 948 (Utah 1993); Scheel, 823 P.2d at 473.

C. The Evidence Was Sufficient to Support Defendant's Conviction for Burglary

Even if this Court determines to address the merits of defendant's claim, the State presented ample evidence to support the jury's determination of guilt. Given defendant's concession that he entered the victim's apartment unlawfully, Br. of App. at 7, 11, 12, the State will only address the sufficiency of the evidence as it relates to defendant's intent at the time of that unlawful entry.

The evidence demonstrated that the victim and victim's roommate both reported the theft of stereo equipment (R. 270, 282). Denise Robinson remembered using the equipment the night of the break-in at about 1:15 a.m. (R. 269-71). The equipment was missing when she returned to her apartment at 3:00-3:15 a.m. (R. 269-70). During this two hour period, an eyewitness observed

defendant inside or entering and exiting the apartment three different times (R. 235-36, 236-37, 239, 240-41).

In order to convict defendant of burglary, the jury need only find that defendant possessed the intent to commit a theft or other felony at the time of his entry into Denise Robinson's apartment; not that the theft be completed. See Utah Code Ann. § 76-6-202 (1990). While defendant correctly states the rule that "[t]he unlawful entry into private premises may not alone support a finding of intent[,]" Br. of App. at 9 (quoting State v. Pitts, 728 P.2d 113, 117 (Utah 1986) (per curiam)), he ignores the evidence outlined above and that "[i]ntent may be difficult to prove but can be inferred." State v. Johnson, 771 P.2d 1071, 1072 (Utah 1989).[2]

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[2]Additionally, since 1886, the Utah Supreme Court has recognized that unlawful entry combined with other factors is sufficient to infer the requisite intent for burglary and the fact that nothing was stolen, or found missing, is irrelevant to that determination. See People v. Morton, 11 P. 512, 513 (Utah 1886) ("it would seem impossible to account for the presence of the appellants at that store that night upon any reasonable hypothesis other than that they were there to steal. The conclusion is irresistible."); Rogerson v. Harris, 178 P.2d 397, 399 (Utah 1947) ("The crime of burglary was perpetrated by the plaintiff's entering the garage with intent to steal. Had he been interrupted and prevented from taking the car, or, after entering, had he changed his mind and decided not to take the automobile, he still would have committed the crime of burglary."); State v. Tellay, 324 P.2d 490, 491 (Utah 1958) (even though nothing found missing in store, "a reasonable inference from the evidence is that the entry was made for the purpose of committing larceny or some other felony. Intent is usually proved by acts and conduct."); State v. Hopkins, 359 P.2d 486, 487 (Utah 1961) ("authorities uniformly affirm that where one breaks and enters into the dwelling of another in the nighttime, without the latter's consent, an inference may be drawn that he did so to commit larceny."); State v. Syddall, 433 P.2d 10, 11 (Utah 1967) (In order to convict of burglary, "[t]he evidence

(continued...)

Defendant asserts that the jury's acquittal on the theft charge means that the jury could not have found the requisite intent for burglary. Br. of App. at 10. However, as the United States Supreme Court stated in United States v. Powell, 469 U.S. 57, 63 (1984):

> "'The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity.'"

Id. (quoting Steckler v. United States, 7 F.2d 59, 60 (2d Cir. 1925)) (in turn quoting Dunn v. United States, 284 U.S. 390, 393 (1932)). Similarly, the acquittal in this case may have been

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[2](...continued)
need not show that a larceny or other felony was in fact committed on the premises entered, but it is sufficient if the evidence shows that at the time of the entry the defendants had the intention to commit the larceny or some other felony."); State v. Clements, 488 P.2d 1044 (Utah 1971) ("The trier of the facts could hardly have failed to believe that the defendant in entering the clinic near midnight did so with the intent to steal."); State v. Sisneros, 631 P.2d 856, 859 (Utah 1981) ("When one breaks and enters a building in the nighttime, without consent, an inference may be drawn that he did so to commit larceny. The fact that nothing was missing when defendant was apprehended is no defense to the burglary charge; nor does it destroy the inference of intent to steal at the time of entry."); State v. Brooks, 631 P.2d 878, 881 (Utah 1981) ("the authorities uniformly agree that where one breaks and enters the dwelling of another in the nighttime, without the latter's consent, an inference may be drawn that he did so to commit larceny."); State v. Wilson, 701 P.2d 1058, 1060 (Utah 1985) ("Defendant's intent to commit a theft may be inferred from the circumstances of the break-in. The fact that nothing was missing when he was apprehended is no defense to the burglary charge, nor does it destroy the inference of intent to steal at the time of entry.").

motivated by any number of reasons. Those unknown motivations do not mean there was insufficient evidence to find the intent to commit theft or another felony beyond a reasonable doubt. Furthermore, as illustrated in note 2, supra, the supreme court has consistently held that even if a theft is not committed, the jury may reasonably find the intent needed to commit burglary.

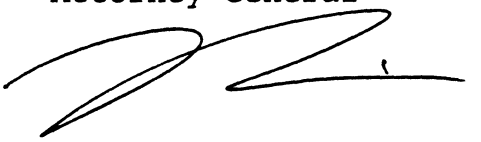
Moreover, the jury's guilty verdict indicates that it clearly found that defendant possessed the requisite intent for the commission of either theft or another felony when he unlawfully entered the victim's apartment. Defendant's unlawful entry combined with the smashed bathroom window, the missing stereo equipment and defendant's failure to explain his presence inside the apartment provided ample support for the jury's finding. The jury correctly found that this intent combined with the unlawful entry satisfied the elements of burglary.

CONCLUSION

Defendant fails to satisfy the marshalling requirement by merely rearguing the evidence rejected by the jury. This Court should therefore refuse to address his claim on appeal. However, if this Court determines to reach the merits of defendant's argument, the State presented sufficient evidence to convict defendant of burglary. Accordingly, this Court should affirm defendant's conviction.

RESPECTFULLY SUBMITTED this 17th day of February, 1994

JAN GRAHAM
Attorney General



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CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Appellee were mailed by first class mail to RONALD S. FUJINO, attorney for appellant, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111, this 17th day of February, 1994.